Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2010

JOSEPH CARIONE

Petitioner

-against-

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court err in finding that Mr. Carione received income from the sale of Grand Carting where the proceeds of the sale were placed in Court-ordered escrow, and ultimately forfeited to the Government over Mr. Carione's objection?

2. Did the Court err in finding that the forfeiture of property as an instrumentality, not proceeds, is a taxable event?

3. Did the Court err in concentrating on the form of the transaction rather than the substance, where forfeiture of the property, rather than the proceeds of its sale, as an instrumentality would not be a taxable event?

4. Was the Commissioner precluded, by the doctrine of consistency, from asserting that Mr. Carione realized income in 2000 from the 1998 sale

of property, when it had contended for five years that the income was earned in the year 1998?

5. Was the Commissioner required to assert a counterclaim in either of Mr. Carione's two actions seeking a refund for the year 1998, when the issue of the year, if any, in which the income was received was squarely presented to the Court in those two actions?

6. Was the assessment of deficiency barred by the Statute of Limitations?

7. Was the payment of taxes on the sale of forfeited property an excessive fine within the meaning of the Eighth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this proceeding Joseph Carione and the Commissioner of Internal Revenue.

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JOSEPH CARIONE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FORTHE SECOND CIRCUIT

CITATION TO DECISION

The decision below was entitled *Carione v. Commissioner of Internal Revenue,* 104 A.F.T.R.2d 2009-770, 2010-1 USTC P 50, 124, 2009 WL 4852903 (2d Cir).

JURISDICTIONAL STATEMENT

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The decision in the case was rendered on December 17, 2009. (Appendix "A", *infra*). The motion to reargue was denied on March 5, 2010 (Appendix "B", *infra*).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES TO BE INCLUDED

26 U.S.C. §6501 (Appendix C, *infra*) ; Federal Rules of Civil Procedure, Rule 13 (Appendix D, *infra*).

STATEMENT OF THE CASE

This case is the fourth case in which the parties litigated the tax consequences of the same transaction, e.g., the seizure, sale and forfeiture of Petitioner's business. Petitioner initially paid taxes for the year of sale, 1998.

He then filed a demand for a refund, contending that the proceeds were not taxable or, in the alternative, were taxable in 2000, when the proceeds were ordered turned over to the Government. There were two suits in the Eastern District of New York litigating the demand for a refund, in which the Respondent insisted that the proceeds were taxable only in 1998. In the second action[1] the Court held that the proceeds were not taxable in 1998 but opined, in dictum, that they were taxable in 2000. The third suit was commenced in the United States Tax Court, after the Respondent assessed a deficiency for the 2000 year, more than three years after Mr. Carione filed his 2000 tax return. This, of

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[1] The first action was dismissed for technical reasons relating to the 1040x.

course, represented not only a reversal of the position that the Respondent took in the District Court, but the first time this position had been taken, despite ample opportunity in the two prior cases. Although the Respondent prevailed in the Tax Court, it issued yet another deficiency for the same income item, for the year 2001. The litigation regarding this deficiency is still pending. Thus, Mr. Carione, has been forced, by the actions of the Respondent, to expend attorneys' fees for four separate lawsuits, and has seen the interest on his purported deficiency, based upon taxes he already paid, skyrocket. Even if Mr. Carione was liable to pay taxes on the gain from the sale of property forfeited as an instrumentality, the actions of the Respondent herein should foreclose them

from collecting those taxes. Moreover, as will be more fully set forth hereinafter, this case presents several issues of first impression.

Pursuant to a 1996 indictment Petitioner Joseph Carione's business (Grand Carting, Inc.) was forfeited to the Government as the instrumentality of the crime to which Mr. Carione plead guilty. The business was sold in 1998. Pursuant to Court order, the proceeds of the sale went to the clerk of the United States District Court, to await the disposition of the indictment.

After the sale of Grand Carting, Mr. Carione and all of his co-defendants pled guilty and agreed to a consent order of forfeiture. The forfeiture was limited to certain named assets, to a maximum of $6,900,721. The order also provided that the

payments toward the judgment were to be made first from the proceeds of the sales of designated properties held by co-defendant Dennis Hickey. If, and only if, the maximum amount of the judgment was not realized by the sale of these properties by a date certain, could the Government then forfeit other specified properties, including the escrowed proceeds of the sale of Grand. There was no provision in the judgment that rendered Mr. Carione personally liable for any amount beyond the proceeds held in escrow by the Court.

Sales of the Hickey properties did not amount of $6 million by the date in the consent order. Therefore, pursuant to Court order dated August 9, 2000, and over Mr. Carione's strenuous objection, the Court

ordered that the proceeds of the sale of Grand Carting be paid directly to the Government. The payment was ultimately made in 2001.

On Mr. Carione's Form 1040 for 1998, his accountant included the profit from the sale of the business as a capital gain to Mr. Carione. Subsequently, realizing that he had overpaid his taxes, Mr. Carione filed a form 1040X on which he did not include the gains from the sale of the forfeited business. He contended that the sale of the business was not a taxable event to him or, alternatively, that the year in which the taxable event occurred was 2000, not 1998.

On June 7, 2001, Petitioner filed the action entitled *Carione v. Commissioner* in the United States District Court for the Eastern District of New York under docket number 01

CV 3936. The Commissioner, in answer, asserted, *inter alia*, a defense based upon its claim that the complaint did not give adequate notice of the basis of Mr. Carione's refund claim. The Commissioner did not assert at any time that the income was realized by Mr. Carione in any year other than 1998, and the answer contained no counterclaim. The parties cross moved for summary judgment in that action.

As to the 2001 action, the Respondent contended that Mr. Carione's claim for refund did not give it timely notice of his theory. Therefore, Mr. Carione filed a second claim for a refund, and a second action in the Eastern District of New York under docket number 03 CV 4024. The Commissioner's answer contained no counterclaim.

On August 27, 2003, the United States District Court for the Eastern District of New York granted the Commissioner's motion dismissing the complaint in action number 01 CV 3936. The Court held that it lacked subject matter jurisdiction.

Thereafter, the parties cross-moved for summary judgment in docket number 03 CV 4024. Respondent did not request any review of Petitioner's tax liability for the year 2000 in connection with that action or that motion, again maintaining that Petitioner had realized gain from the Grand forfeiture in 1998.

On March 17, 2005, the District Court issued a Memorandum and Order granting Petitioner summary judgment on his claim for a refund of the taxes paid for the 1998 year.

In *dictum*, the Court stated that the income was taxable in the year 2000.

On April 4, 2005, the Commissioner moved for reconsideration of the Memorandum and Order, again claiming that the income from the sale of Grand was properly taxable in the 1998 year, NOT the 2000 year. The Commissioner, in that motion, pointed out that the proceeds of the sale had been deposited into an interest-earning account. The interest accumulated was also paid to the government, without action or acquiescence by the petitioner. The motion for reconsideration was denied on May 2, 2005.

The Commissioner filed a notice of appeal from the Order; Mr. Carione filed a cross-notice of appeal from the finding that

the income was taxable in 2000. The Commissioner moved to dismiss Mr. Carione's cross appeal on July 29, 2005, alleging that the finding regarding the 2000 year was *dictum* and, therefore, was not reviewable. That motion was granted by United States Court of Appeals for the Second Circuit on August 17, 2005. The Commissioner subsequently withdrew its appeal.

The United States District Court for the Eastern District of New York issued a judgment to Mr. Carione on November 27, 2006, in the amount of $54,783.48.

Thus, for more than five years, the respondent urged the Eastern District of New York to deny Mr. Carione a refund on the basis that the proceeds of the sale were taxable to Mr. Carione only in the year 1998.

Respondent repeatedly asserted that the income could not, under any circumstances, be taxed in any other year. As stated above, they filed no counterclaim in either of the two actions in the Eastern District of New York.

After the Eastern District of New York awarded Mr. Carione a refund for 1998, Respondent, in 2006, issued a Notice of Determination contending, for the first time, that the gain on the sale of the forfeited business was taxable to Mr. Carione in 2000. Mr. Carione contested the determination by filing a timely petition in the United States Tax Court.

While awaiting the outcome of the Tax Court case regarding 2000, the Respondent issued yet another determination in which it contended that the gain from the sale was

taxable in 2001, that being the year in which the Clerk of the District Court actually remitted the proceeds of the sale to the treasury. Mr. Carione was forced to contest that determination. That action is currently on the 2010 fall trial calendar of the United States Tax Court. Thus, Mr. Carione is now underwriting the costs of a fourth litigation involving the same issue, and the respondent has assigned the same income to three different years.

For the litigation regarding the 2000 year, the parties agreed to submit the case to the Tax Court on stipulated facts. On November 24, 2008, the Tax Court issued a memorandum opinion holding that the income was properly taxed to Mr. Carione in the year 2000, that the statute of limitations had not

expired, and that the Commissioner was not estopped from claiming that the income was properly taxed in the year 2000 rather than in the year 1998.

Mr. Carione appealed the Tax Court determination to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed on December 17, 2009.

It is noteworthy that Respondent has never complied with the November 27, 2006 judgment of the Distr4ict Court to refund to Mr. Carione the $54,783 paid by him with his 1998 tax return. The Respondent has held those funds as offsets toward its claims for 2000 and 2001. However, due to the Respondent's tardiness in asserting its claims, and despite the fact that Mr. Carione already paid the taxes on this very income in another

year, the Respondent's claim has ballooned exponentially, leaving Mr. Carione with a liability of more than $88,000.

REASONS FOR GRANTING THE WRIT

This case involves issues of first impression in this Court regarding the proper tax treatment of property forfeited as an instrumentality, and regarding the issue of whether the Respondent must file a compulsory counterclaim in a case where tax liability is being litigated. In this case, Mr. Carione was taxed despite the facts that he received no economic benefit whatsoever from the sale of Grand Carting, and that he never obtained dominion and control over those proceeds. Moreover, although the issue of the year (if any) in which the gain should be taxed was firmly before the Eastern District of New

York in the first and second lawsuits, the Respondent did not file a counterclaim regarding Mr. Carione's liability for the year 2000.

The Forfeiture of Grand Carting as an Instrumentality Did Not Result in Income to Mr. Carione.

Grand Carting, a Subchapter "S" corporation wholly owned by Petitioner Joseph Carione, became the subject of a criminal forfeiture count in the indictment of Mr. Carione and others. Therefore, when its assets were sold to a third party in 1998, the proceeds of the sale were deposited, at the closing, directly into an escrow account maintained by the Clerk of the Eastern District of New York. The disposition of the proceeds was to await the decision of the Court on the indictment and the forfeiture

count. Subsequently, those assets were paid by the clerk directly to the United States Marshal's Service, pursuant to a judgment of forfeiture. Mr. Carione neither received nor was allowed to exercise any dominion over any of the funds from the sale of Grand Carting. Thus, there was no taxable event as to him, either at the time the assets were sold in 1998, or at the time that the proceeds were ordered remitted to the Government in the year 2000, or at the time the actual payment was made in 2001.

It is well settled law that a person receives gross income, upon which he is liable for taxes, at the time that he obtains dominion and control over the income. *Wood v. United States*, 863 F.2d 417, 419 (5th Cir. 1989); *Gambina v. Commissioner of Internal*

Revenue, 91 T.C. 826 (1988). A taxpayer has dominion and control over revenue when he is free to use it at will. *Ianiello v. Commissioner of Internal Revenue*, 98 T.C. 185 (1992). In *Jones v. United States*, 366 U.S. 213, 218 (1961), the Court described the test for determining when taxable income is received as follows:

> A gain constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. [Quoting *Rutkin v. United States*, 343 U.S. 130, 137)].

Here, without question, Mr. Carione never received such control over the proceeds of the sale. Indeed, he received no control whatsoever.

The indictment against Mr. Carione included a count demanding the forfeiture of

Grand Carting. Grand Carting was forfeited as an instrumentality of the crime alleged in the indictment, rather than as proceeds. Neither Mr. Carione nor Grand Carting received any income or property from the scheme alleged in the indictment.

Based upon the forfeiture counts in the indictment, the Government obtained a restraining order that, *inter alia,* prevented Grand Carting's assets from being sold, except in the ordinary course of business. When Mr. Carione entered into a contract to sell Grand Carting, he was required to obtain the approval of both the Government and the Court.

Thereafter, Mr. Carione, along with his co-defendants, agreed to a consent order of forfeiture, providing for the forfeiture of

certain named assets, to the maximum value of $6,900,721. The preferred assets for the forfeiture were the assets of Dennis Hickey, his family and his corporations. The Order further provided that, only in the event that the judgment was not paid in full by a date certain, could the proceeds of the sale of Grand Carting be forfeited. On the other hand, if Hickey's assets proved sufficient to pay the judgment, Mr. Carione would have been allowed to receive the proceeds of the sale of his business.

The Consent Judgment did not contain any provision imposing personal liability upon Mr. Carione for any shortfall in the amount collected by the forfeiture of the specific property that was the subject of the judgment. The limitation in the judgment of $6.9 million

was the maximum amount to be forfeited, not the minimum amount. The final judgments of forfeiture provided that the forfeiture amount was to be collected "pursuant to the terms and conditions of the Consent Order" and that a judgment would be entered "in accordance with the terms of this Order and the Consent Order." The final judgment provided that Mr. Carione "shall comply with the Order of Forfeiture." There was no personal judgment issued against Mr. Carione. His potential liability was limited to the jeopardy to the proceeds of the sale of Grand Carting.

As events unfolded, the forfeiture fund had a deficit in excess of $2,000,000 on July 1, 2000. Therefore, in accordance with the judgment, the Court ordered that the proceeds of the sale of Grand Carting be paid directly to

the United States Marshal to be placed in the forfeiture fund. Mr. Carione's strident opposition to this action did not prevent the funds from being paid directly by the clerk to the Marshal.

In analogous situations, the Courts have held that taxpayers did not realize income from the sale of assets, or from other income-producing activities. Thus, in *North American Oil Consolidated v. Bernet*, 286 U.S. 417 (1932), government-owned property was operated by the taxpayer. The government instituted an action to oust the taxpayer from the operation of the property, and to force the taxpayer to pay the income to the government. In connection with the action, the Government obtained the appointment of a receiver, to whom all amounts realized from the operation

of the property were paid. In the subsequent year, the Court denied the Government's motion for a receiver, and released all of the income earned to the taxpayer. The taxpayer declared the income in the year it actually was received. The government, however, assessed a deficiency, claiming that the income should have been declared in the year during which it was earned and paid to the receiver. The Court found for the taxpayer, holding that the taxpayer did not have income in the year in which the income was held by the receiver, because the taxpayer did not have the absolute right to demand that the receiver pay over the money to it. Throughout the year of the receivership, the ultimate recipient of the money was in doubt. Thus the taxpayer did not realize income until the Court directed the

receiver to pay the money to the taxpayer. Had the order directed that the receiver pay someone other than the taxpayer, the taxpayer never would have received the income.

Similarly, in *Doyle v. Commissioner of Internal Revenue,* 110 F.2d 57 (2d Cir. 1940), taxpayer entered into a contract to sell certain property. In the year of the contract, she received an installment of earnest money, to be held in escrow. In the following year, another installment was paid for an extension of the contract. Ultimately, the purchaser refused to close title. Taxpayer sued for specific performance, whereupon the buyer counter-sued for a refund of the earnest money. Both parties' claims were unsuccessful, whereupon the taxpayer kept

the earnest money and the property. The Court held that the taxpayer did not realize the earnest money as income until the action was resolved and the disposition of the money was certain. Again, had the Court returned the money to the purchaser, the taxpayer would have received no income.

In the present case, Mr. Carione obviously did not realize income when the property was sold in 1998, because the disposition of the money was in doubt, and because he did not obtain any control over the money in that year. At the end of the 1998 tax year, the disposition of the proceeds of the sale remained uncertain. Had it been returned to Mr. Carione, he would have realized the income when it was returned to him -- not in the year of the sale. See, *North*

American Oil Consolidated v. Bernet, supra; Doyle v. Commissioner of Internal Revenue, supra.

In an analogous situation, the Court held that the taxpayer did not receive income from an involuntary forfeiture of income. In *Murillo v. CIR*, T.C. Memo 1998-13, the petitioner's retirement account (IRA) was forfeited to the Government. He attempted to deduct the forfeiture as a loss. The IRS, on the other hand, attempted to impose a 10% early withdrawal penalty. Both parties lost. The court held that public policy precludes a loss deduction for a forfeiture. However, the Court also held that, since the taxpayer never received, or had control of, the IRA distribution, he never realized the income. Thus, the 10% early withdrawal penalty did

not apply. This is contrasted to situations such as that in *Wood v. U.S.*, *supra*, in which a taxpayer was liable for taxes on income forfeited because the taxpayer had full dominion and control over the income before it was forfeited.

In the District Court opinion in this case, *Carione v. Commissioner,* 368 F. Supp.2d 186 (E.D.N.Y. 2005), the District Court agreed that the sale of the assets produced no income in 1998. It stated:

> Where a taxpayer's would-be income is deposited in an escrow account beyond that taxpayer's reach, it generally should not be included in his taxable income. *See, e.g., C.I.R. v. Indianapolis Power & Light Co.*, 493 U.S. 203, 211 n. 7, 110 S.Ct. 589, 107 L.Ed.2d 591 (1990) (acknowledging Commissioner's concession that security deposits held by power company "would not be taxable if they were placed in escrow"); *Ware v. C.I.R.*, 906 F.2d 62, 65 n. 2 (2d Cir.1990) (fee not actually or

> constructively received by firm for tax purposes so long as held in escrow beyond firm's control); *and Reed v. Comm'r*, 723 F.2d 138, 149 (1st Cir.1983) (taxpayer not required to report income held in bona fide escrow for payment in later tax period and from which no other present beneficial interest is derived). *Id.* At 192-193.

However, in dictum, the Court held that the proceeds became income in the year 2000, when they were paid to the Government.[2] It stated:

> In this case, although the proceeds of Grand Carting's asset sale were never subject to the control of Grand Carting or Carione, they *were* used to pay off the outstanding *Hickey* forfeiture obligations in August 2000. And that

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[2] This holding was dictum because the Government failed to counterclaim in the District Court action and assert that the income was taxable in 2000. This was a mandatory counterclaim, therefore, the principles of *res judicata* and collateral estoppel bared the Government from asserting in this the Tax Court proceeding that Mr. Carione received income in the year 2000. *See infra*.

> event clearly and undeniably marked the "fruition" of an "economic benefit" to Grand Carting and Carione. In light of these facts, and the above authority (controlling and persuasive), it cannot be the case that the sale of Grand Carting's assets was not taxable as "income" or "gain" for the 2000 financial year. Any other result would effectively allow a "deduction for the amount of the forfeiture-a deduction which has been denied on the ground that it would frustrate public policy." *Gambina v. Comm'r*, 91 T.C. 826, 828, 1988 WL 108300 (1988). *Id.* at 195.

It further stated: "Carione is not being taxed for forfeiting anything. He is being taxed on the economic benefit of *avoiding* having to pay a forfeiture judgment out of his own pocket." (*Id.*). This erroneous finding was adopted by the Tax Court and, in essence, by the Second Circuit, in its holding that the proceeds of the sale were income in 2000. In fact, Mr. Carione had no personal obligation to pay any amount on account of the judgment of

forfeiture. Had the full amount of the forfeiture been realized from the sale of Hickey's assets, the proceeds from the escrow account would have been paid to Mr. Carione, at which time he would have realized the income from the sale of the corporation. However, even though the combination of the proceeds of the sale of the Hickey properties and the forfeiture of the proceeds of the sale of Grand Carting were inadequate to pay off the full amount of the forfeiture judgment, Mr. Carione still had no personal liability to pay the judgment arrears. The judgment did not provide a lien against his personal assets, and there was never any attempt to collect from him. Contrary to the determinations below, there was never a possibility that Mr. Carione

would have paid the judgment "out of his own pocket."

The Respondent and the courts were distracted by the form of the transaction, in that the property was sold and the proceeds forfeited. Had Grand Carting been outright forfeited to the Government as an instrumentality, and had the government then chosen to sell the corporation or its assets, Mr. Carione would not have received any taxable income from that sale. The fact that the transaction was reversed does not change its substance. As the Court stated in *Carione v. Commissioner, supra* at 194:

> "[T]he tax law deals in economic realities, not legal abstractions," *C.I.R. v. Southwest Exploration Co.*, 350 U.S. 308, 315, 76 S.Ct. 395, 100 L.Ed. 347 (1956), and its "reach" should not "be delimited by technical refinements or mere formalism." *U.S. v. Joliet & C.R.*

> *Co., 315 U.S. 44, 49, 62 S.Ct. 442, 86 L.Ed. 658 (1942) (citing Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788 (1940)).*

The economic reality of this situation is that Mr. Carione never realized any economic benefit from the sale or the forfeiture of Grand Carting.

In his brief, the Commissioner relied upon cases such a *CIR v. Banks,* 543 U.S. 426 (2005) and *Helvering v. Horst,* 311 U.S. 112 (1940). Those cases hold that, where a taxpayer assigns the right to receive income, the taxpayer still retains the tax liability. In *Helvering v. Horst, supra* at 116-117, the Supreme Court explained:

> Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself

> and diverts the payment from himself to others as the means of procuring the satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them. (citation omitted).

In the instant case, once the proceeds of the sale were seized by the Government, Petitioner did not control the source of the income transferred to the government, and his ownership was in doubt. Petitioner did not divert payment from himself to the government; rather, the proceeds of the sale were seized by the government and, over his objection, transferred to it. Petitioner's lack of control over the disposition of the proceeds was the very reason that he received no income at any time.

In its ruling below, the Second Circuit relied upon the fact that Grand Carting was a subchapter "S" corporation. In holding that the capital gains from the sale of Grand Carting were income to Mr. Carione in the year 2000, the Court stated:

> During all relevant times, Carione was the sole shareholder of Grand Carting, an S corporation. Gross income to Grand Carting therefore also constituted gross income to Carione. See 26. U.S.C. §1366.

That section, in turn, provides that the gross income of a subchapter "S" corporation passes through to its shareholders.

While initially the Court might have felt that this ruling should lead to the affirmance of the Tax Court, the Court failed to realize that, by so ruling, it actually reversed the unappealed final ruling of the

District Court in *Carione v. United States*, 368 F.Supp.2d 196 (E.D.N.Y. 2005).

The Respondent contended in the District Court that Mr. Carione was required to personally declare the income because he was the sole shareholder of a subchapter "S" corporation. On that basis he properly reported the income in 1998, and paid tax thereon. That is because the sale in 1998 resulted in income to him, regardless of the later distribution of the income. This was the very argument made by the Respondent, and rejected by the District Court, in the above-cited decision. In its decision, the Second Circuit reversed that ruling, thereby violating the principles of collateral estoppel and res judicata. The Respondent should have been bound by its decision to forgo the appeal in that case.

Moreover, the Second Circuit should not simply have used the rationale that would have made the item income in 1998 to justify forcing Mr. Carione to declare it as income in the year 2000.

That ruling also undercuts the basis of the EDNY decision, and the basis of the Tax Court's ruling, that the realization of the income was deferred until 2000, because it was unclear whether Mr. Carione would receive it or not. Under the Court's rationale herein, the money was income to Mr. Carione whether it was given to him, or whether it was forfeited to the Government. Under those circumstances, it was nonsensical to defer the income to another year, because Mr. Carione realized it either way.

Properly, the proceeds of the sale would have been income to Mr. Carione only if it were distributed to Mr. Carione. He amply proved that he received no benefit from the seizure of the income pursuant to the judgment of forfeiture.

The Respondent was Precluded from Relitigating the Issue of When Mr. Carione Received Income by the Operation of Res Judicata and/or Collateral Estoppel.

Another issue of first impression is the quetion of whether the Respondent is obligated at assert a compulsory counterclaim in a tax case. In the two original cases in the Eastern District of New York, the issue of the correct year (if any) in which the income was realized by Mr. Carione was squarely before the Court. The Respondent refused to asset a counterclaim, contending, intially, that Mr.

Carione received income only in 1998. After losing its case, the Goverment then asserted that Mr. Carione realized income in 2000. It should have been precluded from doing so.

In its decision the Second Circuit acknowledged that "whether Rule 13(a) applies in taxpayer refund suits is an open question in this circuit." However, it declined to address that issue, relying upon *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948). That reliance was misplaced, because that case is distinguishable from this, and because the holding in that case was limited, by later Supreme Court precedent, to situations that do not apply to this case.

In *Sunnen, supra,* this Court held that collateral estoppel would apply only where the matter raised in the second suit is identical in

all respects to that of the first, and the controlling facts and legal rules remain unchanged. That is exactly the circumstance in this case. At the time of the commencement of both actions in the Eastern District of New York, the first in 2001 and the second in 2003, the proceeds of the sale had been held in escrow since 1998, and ordered distributed to the Government in the year 2000. Neither the facts nor the law changed between either of the District Court cases and the deficiency assessment for the year 2000. Thus, under *Sunnen,* the Respondent should have been estopped. Since there was only a single item of income, and it could only be income in one year, the issue was entirely ripe for adjudication, and should have been held to be adjudicated, in the 2003 action.

Moreover, in *Montana v. United States*, 440 U.S. 147, 161 (1979), this Court limited the holding in *Sunnen* to apply only where there are modifications of the controlling law which intervene after the first decision. That is clearly not the case herein.

Thus, the principles of collateral estoppel apply to this case. As is set forth above, the issue of the proper year in which to declare the income was before the Court in the 2003 action, in which the Respondent should have been compelled to assert its counterclaim. The purpose of the doctrines of res judicata and collateral estoppel is to preclude parties from contesting matters which they had a full and fair opportunity to litigate in the first action, and to protect their adversaries "from the expense and vexation attending multiple

lawsuits...." *Montana v. United States, supra* at 153-154.

This case cries out for the operation of res judicata, and the application of Rule 13(a) to the Respondent. Because the Respondent consciously and deliberately refused to assert a counterclaim in the first action, Mr. Carione has been forced to endure the expense of two additional lawsuits. Moreover, interest on his purported liability continued to run during the years that the Respondent refused to litigate the issue of the proper year to declare the income. The issue of the year in which the income should be declared was ripe for litigation in the 2003 action, and the Second Circuit should have found that the Respondent was bound to litigate it at that time. This Court should hear this case and determine the

obligation of the Respondent to assert a compulsory counterclaim.

The Statute of Limitations Expired for the Year 2000 Prior to the Assessment

An additional issue that should be reviewed by this Court is the issue of when the Statute of Limitations ran on the Respondent's claim. It is Mr. Carione's contention that the Statute ran prior to the assessment for the 2000 year prior to the assessment. This is another issue not previously before this Court.

Relying upon the provisions of 26 U.S.C. §6501(3)(e), the Commissioner contended, and the Tax Court found, that the proper statute of limitations in this action is six years, not three years. The Second Circuit erroneously failed to reach this issue, and reverse on that ground.

First, the provisions of that very section show that the six-year limitation cannot properly be applied to that year. In §6501(e)(1)(a)(ii), the statute provides that:

> In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, **in a manner adequate to apprise the Secretary of the nature and amount of such item.** (Emphasis added).

In this instance, in Mr. Carione filed two 1040X returns for the year 1998. In each of those forms, Mr. Carione made the following statement:

> Taxpayer's accountant incorrectly included a capital gain from a sale of a carting company in which taxpayer had an interest, whereas, in fact, this corporation was not sold in 1998. **The taxable event, if any, should occur in the year 2000. [Emphasis added]**

Thus, Mr. Carione disclosed the existence of the income, the fact that there was a transfer out of the escrow account in 2000, and his contention that this income was not properly includable in his 2000 income. This information was disclosed on Mr. Carione's 1040x in both 2000 and 2002. Both documents were valid tax returns. Since there was no concealment of income, the exception quoted above should apply. The statements on the 1040x, and the extensive litigation of the issue of what, if any, year this item belongs in certainly gave the Commissioner adequate notice of the issue, and the opportunity to have sent a notice of deficiency within the period of the 3-year statute of limitations. Mr. Carione fulfilled both the letter and the spirit of the provisions

of 26 U.S.C. §6501(e)(1)(a)(ii). Thus, the Court should have held that the statute of limitations consequently expired. It is unfair to allow the Respondent, with more than adequate notice of the issue of whether this income should be declared, to extend the statute of limitations on grounds applicable to a situation in which the Government was, in essence, taken by surprise.

Taxing the Proceeds of the Sale of Grand Carting is an Excessive Fine and Constitutes Double Jeopardy.

Finally, this case presents the issue of the interplay between a forfeiture judgment and the provisions of the Fifth Amendment regarding double jeopardy. Under the circumstances of this case, imposing income taxes upon Mr. Carione for the proceeds of the sale of Grand Carting constitutes both an

additional penalty in violation of the Double Jeopardy Clause and an excessive fine under the Eighth Amendment to the United States Constitution.

In *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), this Court held that the imposition of a tax upon the possession and storage of controlled substances, levied upon those convicted of offenses related to those substances, was an additional penalty constituting Double Jeopardy. Although it was characterized as a "tax," it was actually a second penalty. Here, the imposition of a tax upon the proceeds of the sale of Grand Carting, which were immediately forfeited and paid to the government, constitutes an additional punishment of Mr. Carione. Since this

punishment was imposed after Mr. Carione's conviction, it violated the principles of double jeopardy.

Moreover, in *United States v. Bajakajian*, 524 U.S. 321 (1998), the Court held that the forfeiture of the entire amount of currency taken out of the country by the defendant constituted an excessive fine, in that it was grossly disproportional to the offense. Here, Mr. Carione was convicted only of allowing Mr. Hickey's corporation to use Grand Carting's license. Mr. Carione was punished by forfeiting his business, and being placed on probation. Since Grand Carting was a corporation founded and operated by Mr. Carione, this was a very stiff penalty. Adding tax on the proceeds of the sale over which Mr.

Carione never had dominion is an additional, and excessive, fine.

The Tax Court apparently misunderstood this argument. It stated:

> Among other reasons for rejecting petitioner's double jeopardy argument, we note that petitioner's forfeiture obligation was established not after but simultaneously with the guilty pleas that were entered and was imposed as part of the criminal sentencing relating to the guilty pleas.

However, Mr. Carione is not contesting the forfeiture, nor is he contending that the forfeiture constitutes the improper penalty. Indeed, the Tax Court would have no jurisdiction over such a claim. Rather, Mr. Carione contended and contends that compelling him to pay income tax on the forfeited amount constitutes both double jeopardy and an excessive fine. This Court

has not previously examined the effect of the payment of tax on a forfeited asset upon the Double Jeopardy issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

357 Fed.Appx. 310, 2009 WL 4852903 (C.A.2), 104 A.F.T.R.2d 2009-7770, 2010-1 USTC P 50,124

Briefs and Other Related Documents
Judges and Attorneys
This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
Joseph CARIONE, Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 09-1029-ag.
Dec. 17, 2009.

Background: Taxpayer filed action against Commissioner of Internal Revenue after he received notice of deficiency. The United States Tax Court, Swift, J., 2008 WL 4977327, confirmed deficiency. Taxpayer appealed.

Holdings: The Court of Appeals held that: (1) application of escrowed proceeds from sale of S corporation toward satisfaction of forfeiture judgment against S corporation

constituted income to S corporation, and to taxpayer as its sole shareholder; (2) satisfaction of forfeiture liability of S corporation of which taxpayer was sole shareholder was taxable to taxpayer by operation of pass-through provision; and (3) government's income tax claim for subsequent year was not barred by compulsory counterclaim rule based upon taxpayer's refund suit for prior income tax year.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

<-220 Internal Revenue
<-220V Income Taxes
<-220V(O) Small Business Corporations (Subchapter S Corporations)
<-220k3896 k. Income taxable to stockholders; undistributed income. Most Cited Cases

Application of escrowed proceeds from sale of S corporation toward satisfaction of forfeiture judgment against S corporation constituted income to S corporation, and to taxpayer as its sole shareholder; although income generally was not taxable if taxpayer did not have dominion or control over

proceeds, S corporation obtained fruition of economic gain, and thus realized income, when sale proceeds were applied toward satisfaction of its forfeiture liability and taxpayer enjoyed personal benefit because government agreed to exempt taxpayer from personal liability knowing that amount of escrowed proceeds were available to satisfy forfeiture judgment. 26 U.S.C.A. §§ 63(a), 1001(a), 1366(c).

[2] KeyCite Citing References for this Headnote

220 Internal Revenue
220V Income Taxes
220V(O) Small Business Corporations (Subchapter S Corporations)
220k3896 k. Income taxable to stockholders; undistributed income. Most Cited Cases

Satisfaction of forfeiture liability of S corporation of which taxpayer was sole shareholder was taxable to taxpayer by operation of pass-through provision, even if taxpayer was not personally liable on judgment against S corporation. 26 U.S.C.A. § 1366I.

[3] KeyCite Citing References for this Headnote

⇐220 Internal Revenue
⇐220XXVIII Refunding Taxes
⇐220XXVIII(B) Actions for Refunds
⇐220XXVIII(B)9 Trial, Judgment and Review
⇐220k5096 k. Judgment and relief awarded in general. Most Cited Cases

Government's income tax claim for subsequent year based upon capital-gain proceeds from sale of S corporation of which taxpayer was sole shareholder was not barred by compulsory counterclaim rule, even if rule could have applied, based upon taxpayer's prior refund suit for prior income tax-year regarding capital-gain proceeds from sale of S corporation; due to different tax years, prior judgment could act as collateral estoppel only as to those matters in subsequent proceeding that actually were presented and determined in prior suit. Fed.Rules Civ.Proc.Rule 13(a), 28 U.S.C.A.

*311 Appeal from a judgment of the United States Tax Court (Swift, J.).
UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the Tax Court is **AFFIRMED.**
James O. Druker, Kase & Druker, Garden City, NY, Paula Schwartz Fromme, of counsel, for Appellant.

Andrew M. Weiner, Andrea R. Tebbets, Tax

Division, Department of Justice, Washington, DC, for Appellee.

PRESENT: DENNIS JACOBS, Chief Judge, DEBRA ANN LIVINGSTON, Circuit Judge, JED S. RAKOFF,[FN*] District Judge.

FN* Jed S. Rakoff, District Judge, United States District Court for the Southern District of New York, sitting by designation.

***312 SUMMARY ORDER**

***1** Petitioner, Joseph Carione, appeals from an order of deficiency entered February 27, 2009 in the United States Tax Court (Swift, *J.*). Following Carione's indictment for various violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., Carione's business, Grand Carting Inc. ("Grand Carting") (also indicted), was restrained in anticipation of forfeiture. While under indictment, Carione sold Grand Carting (with approval of the court and the government), and the proceeds were placed in escrow. The defendants ultimately pleaded guilty, and the escrowed proceeds were applied toward a forfeiture judgment entered with their convictions. Thereafter, Carione received a notice of deficiency from the IRS stating that he owed taxes for tax-year 2000 on the capital-gain proceeds from Grand Carting's sale. Upon Carione's

redetermination petition, the Tax Court confirmed the deficiency, in the amount of $88,914. We otherwise assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. " 'We review the legal conclusions of the tax court de novo[,] and its factual findings [and law applications] under the clearly erroneous standard.' " *Wright v. Comm'r*, 571 F.3d 215, 219 (2d Cir.2009) (quoting *Merrill Lynch & Co. v. Comm'r*, 386 F.3d 464, 469 (2d Cir.2004)).

[1] ☑ Carione contends principally that capital-gain proceeds from Grand Carting's sale were not includible in his gross income. We disagree. For the following reason, application of the escrowed sale proceeds toward satisfaction of the forfeiture judgment constituted income to Grand Carting, and to Carione as sole shareholder.

The proceeds of Grand Carting's sale were applied (by way of an escrow account) toward satisfaction of the corporation's forfeiture liability. This constituted income to Grand Carting, *see Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 729, 49 S.Ct. 499, 73 L.Ed. 918 (1929), and "gross income," 26 U.S.C. § 63(a), to the extent it was "gain," 26 U.S.C. § 1001(a). During all relevant times, Carione was the sole shareholder of Grand Carting, an S corporation. Gross income to Grand Carting

therefore also constituted gross income to Carione. *See* 26 U.S.C. § 1366(c).

Carione argues that any gains from the Grand Carting sale did not constitute income to him because he never exercised dominion or control over the sale proceeds. But his argument confuses *whether* the gains constituted income to him with *when* that income was taxable-i.e., when the income was realized. It is true that income is generally not taxable if the taxpayer has no dominion or control over the proceeds-for example, where (as here) the proceeds are held in escrow. *Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203, 209, 110 S.Ct. 589, 107 L.Ed.2d 591 (1990); *Ware v. Comm'r*, 906 F.2d 62, 65 (2d Cir.1990). But the principle is one of deferment, not of exemption. In any event, "[w]here the taxpayer does not receive payment of income in money or property"-for example, where (as here) income comprises satisfaction of a personal debt-that income is taxable "when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." *Helvering v. Horst*, 311 U.S. 112, 115, 61 S.Ct. 144, 85 L.Ed. 75 (1940). Grand Carting "obtained **313* the fruition of the economic gain ... already accrued," and thus realized income, when the sale proceeds were applied toward satisfaction of its forfeiture liability.[FN1]

FN1. Carione does not dispute that, if he realized income from Grand Carting's sale, he realized that income in tax-year 2000.

**2 [2] ☑ Carione further argues that satisfaction of the forfeiture judgment did not constitute income to him because he was not personally liable on the judgment. Even assuming that Carione's characterization of his forfeiture liability is accurate, it is beside the point: Satisfaction of Grand Carting's forfeiture liability was taxable to Carione, as Grand Carting's sole shareholder, by operation of the pass-through provision of 26 U.S.C. § 1366I. In any event, it cannot be said that Carione enjoyed no benefit personally from the forfeiture. The assets were sold prior to negotiation of a plea agreement by which Carione was subjected to no further forfeiture. Thus (again, assuming Carione's characterization of his forfeiture liability is accurate) the government agreed to exempt Carione from personal liability knowing the amount of escrowed proceeds available to satisfy the forfeiture judgment.

[3] ☑ Additionally, Carione contends that the government is precluded from asserting now its claim for tax-year 2000 by operation of Rule 13(a) of the Federal Rules of Civil Procedure (the compulsory counterclaim rule), because the claim should have been asserted

in an earlier refund suit. Carione previously sued in the United States District Court for the Eastern District of New York for a refund of taxes he paid for tax-year 1998 on the capital-gain proceeds from Grand Carting's sale. We note that whether Rule 13(a) applies in taxpayer refund suits is an open question in this circuit. Nevertheless, we decline to address it because the government's tax-year-2000 claim-not asserted in the tax-year-1998 refund suit-would not be barred even if we held that Rule 13(a) does apply. *See Comm'r v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 92 L.Ed. 898 (1948) ("[I]f the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.").

We have considered Carione's remaining arguments, and find them to be without merit. For the foregoing reasons, the judgment of the Tax Court is hereby **AFFIRMED**.

C.A.2,2009.
Carione v. C.I.R.
357 Fed.Appx. 310, 2009 WL 4852903 (C.A.2), 104 A.F.T.R.2d 2009-7770, 2010-1 USTC P 50,124

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of March, two thousand ten.

Joseph Carione,

Petitioner-Appellant,

Docket No. 09-1029-ag

v.

Commisisoner of Internal Revenue,

Respondent-Appellee.

Joseph Carione having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that

determined the appeal having considered the request for panel rehearing, and the active

members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED, that the petition is denied.

FOR THE COURT
CATHERINE O'HAGAN WOLFE,
Clerk of the Court

APPENDIX C

26 U.S.C.A. § 6501

I.R.C. § 6501

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 66. Limitations (Refs & Annos)
Subchapter A. Limitations on Assessment and Collection (Refs & Annos)

§ 6501. Limitations on assessment and collection

(a) **General rule.**--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person

(b) from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) Time return deemed filed.--

(1) Early return.--For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 4, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) Return of certain employment and withholding taxes.--For purposes of this section, if a return of tax imposed by chapter 3, 4, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) Return executed by Secretary.--Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) Return of excise taxes.--For purposes of this section, the filing of a return for a specified period on which an entry has been

made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) **Exceptions.**--

(1) **False return.**--In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) **Willful attempt to evade tax.**--In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) **No return.**--In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) **Extension by agreement.**--

(A) In general.--Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(B) Notice to taxpayer of right to refuse or limit extension.--The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

(5) Tax resulting from changes in certain income tax or estate tax credits.--

For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) Termination of private foundation status.--In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) Special rule for certain amended returns.--Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) Failure to notify secretary of certain foreign transfers.--In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

(9) Gift tax on certain gifts not shown on return.--If any gift of property the value of which (or any increase in taxable gifts required under section 2701(d) which) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item which is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(10) Listed transactions.--If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2)) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of--

(A) the date on which the Secretary is furnished the information so required, or

(B) the date that a material advisor meets the requirements of section 6112 with respect to a

request by the Secretary under section 6112(b) relating to such transaction with respect to such taxpayer.

(d) Request for prompt assessment.--Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless--

(1) (A) such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;

(2) (A) such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or

(3) a dissolution has been completed at the time such written request is made.

(e) Substantial omission of items.--Except as otherwise provided in subsection (c)--

(1) Income taxes.--In the case of any tax imposed by subtitle A--

(A) General rule.--If the taxpayer omits from gross income an amount properly includible therein and--

(i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or

(ii) such amount--

(I) is attributable to one or more assets with respect to which information is required to be reported under section 6038D (or would be so required if such section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and

(II) is in excess of $5,000,

the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(B) Determination of gross income.--For purposes of subparagraph (A)--

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(C) Constructive dividends.--If the taxpayer omits from gross income an amount properly includible therein under section 951(a), the tax may be assessed, or a proceeding in court for the collection of such tax may be done without assessing, at any time within 6 years after the return was filed.

(2) Estate and gift taxes.--In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(3) Excise taxes.--In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return is filed. In determining the amount of tax omitted on a

return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) Personal holding company tax.--If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth--

(1) the items of gross income and adjusted ordinary gross income, described in section 543, received by the corporation during such year, and

(2) the names and addresses of the individuals who owned, within the meaning of section 544 (relating to rules for determining stock ownership), at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation,

the personal holding company tax for such year may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return for such year was filed.

(g) Certain income tax returns of corporations.--

(1) Trusts or partnerships.--If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.

(2) Exempt organizations.--If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

(3) DISC.--If a corporation determines in good faith that it is a DISC (as defined in section 992(a)) and files a return as such under section 6011(c)(2) and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) Net operating loss or capital loss carrybacks.--In the case of a deficiency

attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

(i) **Foreign tax carrybacks.**--In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) (relating to carryback and carryover of excess foreign taxes) or under section 907(f) (relating to carryback and carryover of disallowed foreign oil and gas taxes), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(c) or 907(f) which result in such carryback.

(j) **Certain credit carrybacks.**--

(1) **In general.**--In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a

deficiency for the taxable year of the unused credit which results in such carryback may be assessed, or with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

(2) Credit carryback defined.--For purposes of this subsection, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(k) Tentative carryback adjustment assessment period.--In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable, except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be

assessed solely by reason of subsection (h) or (j), as the case may be.

(l) Special rule for chapter 42 and similar taxes.--

(1) In general.--For purposes of any tax imposed by section 4912, by chapter 42 (other than section 4940), or by section 4975, the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940, such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) Certain contributions to section 501(c)(3) organizations.--In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in section 4942(g)(3) (relating to certain contributions to section 501(c)(3) organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

(3) Certain set-asides described in section 4942(g)(2).--In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii), such deficiency may be assessed at any time before the expiration of 2 years after the expiration of the period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

(m) Deficiencies attributable to election of certain credits.--The period for assessing a deficiency attributable to any election under section 30(e)(6), 30B(h)(9), 30C(e)(5), 30D(e)(4), 40(f), 43, 45B, 45C(d)(4), 45H(g), or 51(j) (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(n) Cross references.--

(1) For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4).

(2) For extension of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229.

(3) For declaratory judgment relating to treatment of items other than partnership items with respect to an oversheltered return, see section 6234.

APPENDIX D

Federal Rules of Civil Procedure Rule 13

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the
United States District Courts (Refs & Annos)
"Title III. Pleadings and Motions
➡**Rule 13. Counterclaim and Crossclaim**

(a) Compulsory Counterclaim.

(1) ***In General.*** A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) ***Exceptions.*** The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the

pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any

property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Appendix E

United States Tax Court.
Joseph CARIONE, Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 23559-06.
Nov. 24, 2008.

James O. Druker, for petitioner.

Theresa G. McQueeney, for respondent.

MEMORANDUM OPINION
SWIFT, Judge.

*1 Respondent determined a deficiency of $88,914 in petitioner's 2000 Federal income tax.

The primary issue for decision is whether $388,301 in capital gain income received relating to a 1998 court-ordered criminal forfeiture sale of the assets of petitioner's S corporation is taxable to petitioner and if so whether it is taxable to petitioner in the year 2000.

Unless otherwise indicated, references to sections are to the Internal Revenue Code applicable to 2000, and references to Rules are to the Tax Court Rules of Practice and Procedure.

Background

The facts have been stipulated and are so found. This case has been submitted under Rule 122. At the time of filing his petition, petitioner resided in New York.

During the 1990s petitioner was president, chief operating officer, and sole shareholder of Grand Carting, Inc. (Grand Carting), a New York S corporation which operated a commercial trash-hauling business on Long Island, New York.

In 1996 the United States indicted petitioner, Grand Carting, and other individuals in the Federal District Court for the Eastern District of New York (District Court) on charges of money laundering, conspiracy, and other crimes under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. secs. 1961-1968 (2006).

The indictment also asked for "RICO forfeiture" to the United States of assets which petitioner and the other named defendants acquired or maintained in violation of RICO. See 18 U.S.C. sec. 1963(a).

On September 10, 1996, the District Court issued a restraining order which, among other things, restrained petitioner, without approval of the court, from in any way alienating or selling the property and assets of Grand

Carting other than in the ordinary course of business and appointed the U.S. Marshals Service to monitor Grand Carting and to ensure that its assets were not sold or wasted during the pendency of the restraining order.

During the pendency of the criminal charges, Grand Carting lost customers and revenue. Accordingly, petitioner sought to sell the assets of Grand Carting, and petitioner negotiated for the sale of Grand Carting's assets to Waste Management of NY, Inc. (WMI), for $548,309.

On May 5, 1998, after obtaining permission from the District Court and pursuant to an order of the District Court, the sale of Grand Carting's assets to WMI occurred, and the $548,309 proceeds were deposited into an escrow account with the District Court to be withdrawn only upon further order of the court.

Considering only its tax bases in the assets sold, on the sale to WMI Grand Carting realized a net long-term capital gain of $388,301.

On February 12, 1999, as part of the plea agreements which were entered into in the criminal case, the District Court issued a Consent Order of Forfeiture signed by all of the defendants in the criminal case including Grand Carting and petitioner. As part of the

Consent Order of Forfeiture the defendants in the criminal case, including Grand Carting and petitioner, agreed that they were jointly and severally liable to the United States for a forfeiture judgment of $6,900,721.

*2 The February 12, 1999, Consent Order of Forfeiture provided that the $6.9 million forfeiture judgment was to be fully paid by the defendants by July 1, 2000, and that initially payments on the judgment were to be made by various lead defendants in the criminal case other than Grand Carting and petitioner. However, the forfeiture judgment also provided that Grand Carting's assets that had been placed in escrow were subject to forfeiture to pay for any balance due on the forfeiture judgment as of the July 1, 2000, payment deadline. The language of the Consent Order of Forfeiture reads as follows:

In the event that the Forfeiture Judgment is not fully paid by July 1, 2000, the government may in its sole discretion sell, and/or forfeit and sell, all property restrained in this matter, including the proceeds of the sale of Grand Carting, which shall be held in escrow until the Forfeiture is satisfied, or until July 1, 2000, whichever is earlier. The funds realized by the sale of these properties, after payment of all reasonable costs, expenses associated with the sale, shall be forfeited to the government to the extent that the Forfeiture Judgment remains unsatisfied, and

the funds shall be deposited into the Asset Forfeiture Fund and credited towards the Forfeiture Judgment.

On July 1, 2000, the balance unpaid on the forfeiture judgment was over $2 million, and on August 9, 2000, the District Court ordered that the $548,309 proceeds from the sale of Grand Carting's assets which were in the escrow account be transferred into the Asset Forfeiture Fund and be applied as further payment on the forfeiture judgment.

On August 9, 2000, the District Court issued an order which referenced the July 1, 2000, payment deadline and which ordered that the proceeds be released from escrow, be paid into the Asset Forfeiture Fund, and be applied to the forfeiture judgment.

On January 16, 2001, $560,689 in the escrow account, plus accrued interest of $63,292, was actually disbursed from the escrow account and transferred into the Asset Forfeiture Fund.

Tax Returns

The $388,301 net long-term capital gain realized on the sale of Grand Carting's assets was reported on its 1998 Federal corporate income tax return and on an attached Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., indicating petitioner as the sole shareholder.

In October 1999 petitioner, a cash basis taxpayer, filed his 1998 individual Federal income tax return and reported thereon the $388,301 net long-term capital gain realized on the sale of Grand Carting's assets as passthrough income to petitioner.

On September 18, 2000, petitioner paid to respondent the $49,400 in Federal income taxes attributable to the $388,301 reported capital gain on the sale of Grand Carting's assets.

On November 2, 2000, petitioner filed with respondent an amended 1998 Federal income tax return on which petitioner claimed that the assets of Grand Carting were not sold in 1998 and that the proceeds relating to the sale of the assets should be taxed to him, if ever, in 2000.

*3 On or about September 6, 2002, petitioner filed a second amended 1998 Federal income tax return on which petitioner claimed further that the $388,301 proceeds should not be taxable to him in 1998 because the proceeds were directly forfeited to the U.S. Government and he never had dominion and control over them. Petitioner's two amended tax returns include the following statement: "Taxpayer's accountant incorrectly included a capital gain from the sale of [Grand Carting], whereas in fact, this corporation was not sold

in 1998. The taxable event, if any, should occur in the year 2000."

For 2000, Grand Carting did not file a Federal corporate income tax return.

On October 15, 2001, petitioner filed his 2000 Federal income tax return and reported thereon total income of $44,165, which did not include any portion of the $388,301 long-term capital gain relating to the sale of Grand Carting's assets.

No disclosure was made on petitioner's 2000 Federal income tax return relating to the sale of Grand Carting's assets or the $388,301 proceeds.

On their 1998, 1999, 2000, and 2001 Federal income tax returns, neither petitioner nor Grand Carting reported the $63,292 in interest income that accrued over the course of those years on the funds being held in escrow, which interest in January of 2001 was transferred to the Asset Forfeiture Fund.

District Court Refund Suit

On the basis of respondent's failure to allow petitioner the refund that was claimed in petitioner's two amended 1998 Federal income tax returns, petitioner timely filed in the District Court for the Eastern District of New York a suit for refund alleging overpayment of his 1998 Federal income

taxes. See *Carione v. United States*, 368 F.Supp.2d 186 (E.D.N.Y.2005), motion for reconsideration denied, 368 F.Supp.2d 196 (E.D.N.Y.2005), appeal dismissed per unreported stipulation (2d Cir. Sept. 19, 2005).

In the District Court litigation, petitioner argued that because the proceeds were subject to the forfeiture order and were placed directly in escrow, he neither received nor had control over the proceeds. Accordingly, petitioner claimed that he should not be taxed thereon--not in 1998 when Grand Carting's assets were sold and not in 2000 when the proceeds were ordered by the District Court to be withdrawn from escrow and paid on the forfeiture judgment.

In the District Court litigation, the Government argued that the proceeds should be taxed to petitioner in 1998 because petitioner in 1998 negotiated the sale of Grand Carting's assets, because the sale of the assets actually occurred in 1998, and because petitioner knew that the proceeds of the sale would be placed in escrow and eventually likely used to satisfy the forfeiture judgment

On March 17, 2005, the District Court in *Carione* ruled in petitioner's favor and held that the proceeds were not taxable to petitioner in 1998. rather, the District Court explained, the proceeds should be taxed to

petitioner in August 2000 when the proceeds were ordered to be released from the bona fide and arm's-length escrow over which the District Court, not petitioner, had control and in the year in which the proceeds effectively were used to satisfy petitioner's forfeiture judgment.

*4 An appeal from the District Court's opinion was dismissed pursuant to the parties' stipulation, and on September 19, 2005, the District Court's judgment in *Carione* became final.

On September 7, 2006, respondent mailed to petitioner a notice of deficiency for 2000 charging petitioner in that year with the $388,301 additional long-term capital gain income relating to the sale and use of the $388,301 Grand Carting proceeds to pay petitioner's obligation on the forfeiture judgment.

One day before the scheduled trial herein, respondent filed a motion for leave to file a second amended answer seeking to charge petitioner with $63,291 in interest income that had accrued on the $388,301 Grand Carting proceeds while the proceeds were held in the escrow account.

Discussion

Under section 61, all income from whatever source derived is included in gross

income. Under section 61(a)(2) and (3), gains derived from business and from dealings in property are specifically included in gross income.

Under section 1366, because petitioner was the sole shareholder the gains and losses of Grand Carting pass through to petitioner, and the possibility that the assets of Grand Carting may have been earned through illegal activities does not alter the taxability of gains relating thereto. See *James v. United States*, 366 U.S. 213, 218 (1961).

It is clear that the proceeds realized on the sale of Grand Carting's assets generally would be taxable to petitioner as the 100-percent owner of the stock of Grand Carting.

Petitioner, however, argues that the $388,301 Grand Carting proceeds should not be charged to him as income even in 2000 because the proceeds were placed directly into escrow and were always subject to the District Court's control, not petitioner's.

Petitioner further emphasizes that from the beginning of the forfeiture proceeding his liability under the $6.9 million forfeiture judgment was not personal, was to be paid solely from, and was limited or capped by the amount of, the proceeds realized on a sale of the Grand Carting assets.

We note that if the proceeds are taxable to petitioner in 2000, there clearly was an omission of more than 25 percent of gross income on petitioner's 2000 Federal income tax return, the 6-year period of limitations would apply, and respondent's notice of deficiency to petitioner for 2000 would be timely. FN1

FN1. Respondent argues in the alternative that if the assessment period of limitations with regard to petitioner's Federal income taxes for 2000 is not open under sec. 6501(e)(1)(A), then the assessment period of limitations for 2000 would be open under the mitigation provisions of secs. 1311 to 1314.

The District Court in *Carione v. United States, supra* at 194, explained with regard to the taxability of the proceeds to petitioner as follows:

Courts should construe "income" liberally, "in recognition of the intention of Congress to tax all gains except those specifically exempted. * * * [*James v. United States*, 366 U.S. 213, 219 (1961).] A further general principle of taxation is that "an individual should be taxed on any economic benefit conferred upon him, to the extent that the benefit has an ascertainable fair market value." The above quotes suggest, and the various cases demonstrate, that a taxpayer does not gain income *only* through his dominion and control over something; a

taxpayer also realizes taxable income where he "obtains the fruition of the economic gain which has already accrued to him." *Comm'r v. Fender Sales, Inc.*, 338 F.2d 924, 928 (9th Cir.1964).

*5 In conformity with these principles, the Supreme Court has long held that "discharge by a third person of an obligation to [the taxpayer] is equivalent to receipt by the person taxed." *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 729 * * * (1929) (employer's payment of employee's taxes constitutes taxable income). "Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other." [*United States v. Joliet & C.R. Co.*, 315 U.S. * * * [44, 49 (1942)] (quoting *Raybestos-Manhattan, Inc. v. U.S.*, 296 U.S. 60, 64 * * * (1935)). Where a taxpayer's property interest, even one that was never in his control or possession, is used to satisfy his outstanding obligation to the Government, the corresponding reduction in the amount of that obligation constitutes an "economic benefit," and is taxable as income. See *Koehn v. Comer*, No. 97 Civ. 76328, 2003 WL 1735496, at *1 (E.D.Mich. Feb. 19, 2003).

With regard to whether the capital gain should be included in petitioner's income in 1998, however, the District Court went on to explain as follows:

Where a taxpayer's would-be income is deposited in an escrow account beyond that taxpayer's reach, it generally should not be included in his taxable income. *See, e.g.*, *C.I.R. v. Indianapolis Power & Light Co.*, 493 U.S. 203, 211 n. 7 * * * (1990) (acknowledging Commissioner's concession that security deposits held by power company "would not be taxable if they were placed in escrow"); *Ware v. C.I.R.*, 906 F.2d 62, 65 n. 2 (2d Cir.1990) (fee not actually or constructively received by firm for tax purposes so long as held in escrow beyond firm's control); *and Reed v. Comm'r*, 723 F.2d 138, 149 (1st Cir.1983) (taxpayer not required to report income held in bona fide escrow for payment in later tax period and from which no other present beneficial interest is derived). [*Carione v. United States*, 368 F.Supp.2d at 192-193.]

And the District Court concluded that-

(1) the sale of Grand Carting's assets produced taxable income to Grand Carting, (2) and thus to Carione, but (3) only in August 2000, when such proceeds were released from escrow and used to satisfy * * * [petitioner's] prior forfeiture judgment. [*Id.*]

We generally agree with the analysis of the District Court as to the applicable tax law. We also agree with the District Court's dicta that petitioner has taxable income for 2000 from the proceeds of the sale of Grand Carting's assets.[FN2]

FN2. Respondent acknowledges that the doctrine of collateral estoppel does not apply to the resolution of this issue.

For Federal income tax purposes, a gain is treated as realized when the taxpayer receives the benefit of the gain, which may occur even if the proceeds representing the gain are not paid directly to the taxpayer. *Helvering v. Horst*, 311 U.S. 112, 115 (1940). The proceeds from the sale of Grand Carting's assets were not paid to petitioner in 1998, and because they were escrowed petitioner did not receive the benefit of the proceeds until 2000 when they were ordered to be released from escrow and used to discharge petitioner's debt under the forfeiture judgment.

*6 When the defendants in the criminal case (including petitioner) failed to satisfy the July 1, 2000, forfeiture payment deadline and the escrowed proceeds were ordered released by the District Court to be applied to the forfeiture fund (i.e., in August 2000), petitioner received the economic benefit of the 1998 $388,301 net capital gain and of the $63,292 interest income. The August 9, 2000, District Court order memorialized the release of the funds from escrow and resulted in a discharge of petitioner's forfeiture obligation.

As sole shareholder of the S corporation, petitioner is charged with the income thereof and is to be taxed thereon on August 9, 2000, when he received the economic benefit of the proceeds upon entry of the order directing application thereof to his obligation under the criminal forfeiture.

We note that although the escrowed funds were physically transferred out of the escrow in January 2001, the benefit of the escrowed funds shifted to or was realized by petitioner on August 9, 2000, the date of the District Court's order. As of that date petitioner's liability under the forfeiture judgment was satisfied and the various parties' entitlement to the funds was settled and no longer in dispute.

Because the unreported $388,301 long-term capital gain taxable to petitioner in 2000 is in excess of 25 percent of the reported 2000 gross income of $44,165, the 6-year period of limitations under section 6501(e)(1)(A) applies and respondent's September 7, 2006, notice of deficiency is timely.

On the basis of well-established tax law we conclude that the $388,301 proceeds are taxable to petitioner in 2000. As the Supreme Court has held, the "discharge by a third person of an obligation to * * * [the taxpayer] is equivalent to receipt by the person taxed."

Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 729 (1929) (employer's payment of employee's taxes constitutes taxable income to the employee).

Respondent also argues that under the doctrine of judicial estoppel petitioner should be barred from challenging the taxability to him in 2000 of the forfeiture funds. Judicial estoppel is an equitable doctrine that prevents a party in a subsequent judicial proceeding from asserting a position contradictory to a position that the party asserted and that a court adopted in a prior judicial proceeding.

We have explained the proper application of judicial estoppel as follows:

> We hold that the doctrine of judicial estoppel is available in the Tax Court to be used in appropriate cases, such as the one before us, to prevent parties from taking positions that are inconsistent with those previously asserted by the parties and accepted by courts and that would result in inappropriate and prejudicial consequences to the courts. [*Huddleston v. Commissioner*, 100 T.C. 17, 28-29 (1993).]

In view of petitioner's affirmative contention in the prior refund suit that the forfeiture proceeds should be taxable to petitioner, if at all, in 2000, and the District Court's agreement therewith, and in view of

our holding that petitioner is taxable on the proceeds, petitioner is judicially estopped from denying the taxability thereof in 2000.

*7 We conclude that the doctrine of judicial estoppel also applies here to bar petitioner from arguing that he is not taxable on the $388,301 proceeds in 2000.

Petitioner argues that in his District Court refund suit the Government should have filed a counterclaim raising an alternative issue as to the taxability to petitioner of the forfeiture proceeds in 2000. Having failed to do so, petitioner argues respondent now is precluded from asking this Court to tax him in 2000 on the proceeds. Petitioner states that respondent is engaged in "serial litigation" (i.e., "trying to tax the same item of income in different years, particularly where the issue was squarely raised in the first lawsuit.").

We disagree. Each taxable year stands on its own. Respondent's position that petitioner should be taxed on the forfeiture proceeds in 2000 was not a required counterclaim in petitioner's tax refund suit for 1998. See Fed.R.Civ.P. 13(a) and (b); *Flora v. United States*, 362 U.S. 145, 166 (1960); *Hemmings v. Commissioner*, 104 T.C. 221, 234-235 (1995).

Petitioner argues that under the duty-of-consistency doctrine respondent should not be allowed to take a position in this case

inconsistent with the position respondent took in the District Court litigation. To the contrary, petitioner never relied on respondent's adjustment that the forfeiture funds should be taxed to petitioner in 1998, and petitioner's own amended 1998 Federal income tax return stated that the funds should be taxed in 2000, if at all. Further, the District Court rejected respondent's position as to the year 1998. See *Cluck v. Commissioner*, 105 T.C. 324, 332 (1995), for an explanation of the proper application of the duty of consistency doctrine.

Lastly, citing *Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994), and *United States v. Bajakajian*, 524 U.S. 321 (1998), petitioner argues that taxing him on the $388,301 proceeds would violate the double jeopardy clause of the Constitution.

In *Kurth Ranch*, a tax imposed upon the possession and storage of illegal substances constituted an additional penalty on those convicted of selling the substances and violated the defendant's rights under the Fifth Amendment's Double Jeopardy Clause. Here, petitioner claims that because the forfeiture of the proceeds occurred after the guilty pleas were entered, the forfeiture constituted an impermissible additional punishment of petitioner and unconstitutional double jeopardy.

Among other reasons for rejecting petitioner's double jeopardy argument, we note that petitioner's forfeiture obligation was established not after but simultaneously with the guilty pleas that were entered and was imposed as part of the criminal sentencing relating to the guilty pleas.

We have considered and we reject all other arguments made by petitioner as to the nontaxability of the $388,301 proceeds.

Petitioner objects to respondent's attempt by motion filed just before the scheduled trial herein to raise an issue as to the taxability to him of the $63,291 in interest income which had accrued on the $388,301 Grand Carting proceeds while the proceeds were in the escrow account. Petitioner notes that respondent was fully aware of this interest income during discovery that occurred in the District Court refund suit and that respondent's failure herein to raise the taxability thereof by motion and on a timely basis should be denied. We agree. See Rule 41(a).

*8 Respondent has provided no adequate explanation as to why the taxability of the interest income was not raised earlier than the eve of the scheduled trial herein. We will deny respondent's untimely motion to amend his answer to charge petitioner with an additional $63,291 in interest income.

An appropriate order and decision will be entered.

APPENDIX F

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

JOSEPH CARIONE,	)	
	)	
Petitioner	)	
	)	
v.	)	Docket No.
	)	23559-06
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion, T.C. Memo. 2008-262, filed November 24, 2008, it is

ORDERED that respondent's Motion for Leave to file and Second Amended Answer Out of time filed with the Court on December 3, 2007 is denied. It is further

ORDERED AND DECIDED that there is due and owing from petitioner for his tax year 2000, a deficiency in the icome tax in the amount of $88,914.

(Signed) Stephen J. Swift
Judge

ENTERED: FEB 27 2009